IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-945

BOROUGH OF ELLWOOD CITY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
PENNSYLVANIA POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT PENNSYLVANIA POWER COMPANY IN OPPOSITION

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January 31, 1979

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Orders and Opinions Below

The initial decision of the Presiding Administrative Law Judge dismissing the complaint of the Borough of Ellwood City, Pennsylvania for recovery of alleged overcharges, issued April 15, 1975, in Federal Power Commission Docket No. E-7317, *Pennsylvania Power Company*, is set forth in Petitioner's Appendix A at 1a. The March 8, 1977 order of the Commission affirming this decision is set forth in Petitioner's Appendix B at 16a. The Commission order of April 29, 1977 denying a rehearing is set forth in Petitioner's Appendix C at 21a. The Court of Appeals opinion

of August 8, 1978 affirming the Commission's order is in Petitioner's Appendix D at 23a and is reported at 583 F.2d 642 (3d Cir. 1978). The order of the Court of Appeals on September 13, 1978 denying a rehearing is set forth in Petitioner's Appendix E at 39a.

Jurisdiction

The jurisdictional prerequisites are set forth in the Petition.

Question Presented

Did the United States Court of Appeals correctly decide that the Federal Power Commission had discretion to excuse the Pennsylvania Power Company for its good faith failure to file rate schedules during the period from 1939 until 1964 when the Federal Power Commission did not assert its jurisdiction over the underlying transactions?

Statutes Involved

Section 205(c), (d) of the Federal Power Act, 16 U.S.C. § 824d(c), (d), is set forth in the Petition, at pp. 3-4. Section 309 of the Federal Power Act, 16 U.S.C. § 825(h), states in pertinent part:

> "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."

Statement of the Case

Petitioner, Ellwood City, is a municipality in Pennsylvania which purchases electric power at wholesale from Respondent, Pennsylvania Power Company (the "Company" or "Penn Power"). In 1935, the Petitioner began

a five-year contract with the Company. At that time, the Company had no generation of its own and purchased all of its electric power across state lines from the Ohio Edison Company. The Company, as well as the Pennsylvania Public Utility Commission (the "PPUC"), believed that such sales were subject solely to state jurisdiction. This view was based upon Section 201(a) of the Federal Power Act, 16 U.S.C. § 824(a), which provided for federal regulation "to extend only to those matters which are not subject to regulation by the States."

Nonetheless, in 1938 the Federal Power Commission (the "Commission" or "FPC") directed the Company to file with the Commission its 1935 contract with Petitioner.[1] The Company complied and the contract was denominated "Pennsylvania Power Company Rate Schedule FPC No. 6" with an effective date of December 1, 1935. Petitioner's App. D at 25a-26a.

In 1939, the Company constructed its own generating plant within the State of Pennsylvania with sufficient capacity to meet the needs of all of its wholesale customers, including Ellwood City. Although the Company remained interconnected to the Ohio Edison Company, it believed, until 1964, that its sales at wholesale did not constitute interstate sales of wholesale power within the meaning of the Federal Power Act.[2] Accordingly, during the period in question, whenever the Company sought changes in its rates, it made filings with the PPUC rather than the FPC.[3]

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1. The Federal Power Commission was replaced by the Federal Energy Regulatory Commission ("FERC" or "Commission") as of October 1, 1977. For purposes of this brief, the "Commission" when used in the context of action taken prior to October 1, 1977, refers to the FPC; otherwise, "Commission" refers to the FERC.

2. Many other electric untilities took similar positions regarding their own wholesale sales. Petitioner's App. B at 19a.

3. The Company also made informational filings with the Commission which reflected changes in its rates as established by the PPUC.

All rates charged from 1939 to 1964 were approved by the PPUC and Ellwood City either participated in or had an opportunity to participate in all relevant proceedings before the PPUC.

In 1964, this Court decided *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), (the *Colton* case), which affirmed Commission jurisdiction over wholesale power sales within a state when any part of the in-state utility's energy came from out-of-state. The Federal Power Commission thus was held to have had jurisdiction since the passage of the Federal Power Act over virtually all wholesale sales of electric power.

In response to inquires from many utilities about the status of FPC regulation of wholesale power sales, the Commission issued Order No. 282, 31 F.P.C. 972 (1964), in which the Commission stated that it did "not intend on its own motion to initiate any inquiry into past failures to file such schedules" as long as utilities filed their then current rates by August 1, 1964. *Id.* at 973.

Pursuant to Order No. 282, the Company filed its then current wholesale rates with the Commission. The Company was informed by the Commission that it did not have to file any past unfiled rate schedules. In September of 1964, the Company was notified that its then current rates were accepted and were designated Supplement No. 4 to Rate Schedule No. 6. Petitioner's App. D at 27a-28a.

In August 1966, the Company and Ellwood City entered a new contract, containing a rate reduction, which was filed with and approved by the Commission.

Two months thereafter, Petitioner filed its complaint with the Commission seeking refunds of approximately $312,000. The sole legal argument Petitioner has made throughout this case is that only the rate filed in 1938 could legally be charged until a superceding rate was filed in 1964.

Thus, under Petitioner's theory, the Commission would be required to order refunds of all amounts paid above the 1938 filed rate without regard to the equities. The Administrative Law Judge disagreed with this proposition and held that the filed rate doctrine was not an inflexible restraint upon the Commission and that the Commission had the equitable power to refrain from ordering a refund. Alternatively, the Administrative Law Judge held that he had the discretion to reconstruct the past "to determine, as best we can, whether the rates in effect at the time would have been held to be just and reasonable, if appropriate filings had been made." Petitioner's App. A at 12a. Using this standard of review, the Judge found "even if a reconstruction of the past were required or deemed appropriate, it would show no substantial overcharges by Penn Power, justifying the ordering of refunds." *Id.* at 14a.

Ellwood City appealed the decision of the Administrative Law Judge to the Commission, which affirmed. The Commission found that Order No. 282 was consistent with its prior decisions. Petitioner's App. B at 18a. The Commission held that its discretionary power to excuse failures to file prior to August of 1964 was properly exercised since Penn Power "was not trying to avoid regulation but simply had picked the wrong forum." *Id.* at 19a. The Commission thereafter denied a petition by Ellwood City for rehearing. Petitioner's App. C.

Ellwood City then appealed to the Court of Appeals for the Third Circuit. Judge Higginbotham, speaking for that Court, affirmed, stating that the Commission had the discretion to issue Order No. 282 and apply that Order to the Company by excusing its past failures to file and, alternatively, that no rate was on file in 1964 to which the filed rate doctrine applied (the 1935 contract filed in 1938 having long since expired by its own terms). Petitioner's App. D

at 37a-38a. Judge Higginbotham aptly summarized this case:

> "This case is vivid illustration of Mr. Justice Holmes' maxim, '[A] page of history is worth a volume of logic.'[2] Only after one understands the history of the relationship between Penn Power, Ellwood, the Federal Power Commission and the Pennsylvania Public Utilities Commission does one recognize that the surface logic of Ellwood's contention leads to a conclusion inconsistent with the relevant statutes and the principle of consumer protection those statutes embody. The complexity of this case has been accentuated by Penn Power's having been lulled for over 25 years into believing that the Commission had no jurisdiction over the sales in question. Penn Power is not to be faulted for this belief, since the Commission itself assumed it was without jurisdiction over these transactions. During the period in which Penn Power did not file with the Commission, it did not operate without regulation. Its rates were reviewed by the Pennsylvania Public Utilities Commission which considered itself to have jurisdiction over these sales. Thus Ellwood is now demanding that the Commission order refunds on the basis of sales that the Commission had initially considered beyond its jurisdiction and which the Pennsylvania Public Utilities Commission had considered within its scope of authority.

"2. *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963 (1921)." *Id.* at 25a.

Reasons for Denying the Writ

Petitioner argues that this case "falls squarely within the filed rate doctrine" and that therefore the decision of the Court of Appeals conflicts with filed rate doctrine decisions of both this Court and other courts. Petition at p. 13. There is, however, no such conflict; the filed rate doctrine

by its terms does not even apply to this case. Petitioner attempts to reinterpret that doctrine to limit the Commission's own authority.

Contrary to Petitioner's assertions, this case involves the very narrow question of whether the Commission had the discretion to excuse past failures to file rates by a Company which having once filed such a rate thereafter failed to file due to its good faith belief that the Commission had no jurisdiction over what were believed to be completely intrastate transactions. Although, as Judge Higginbotham stated, this precise question had not previously been subject to appellate review, there is no conflict with previous decisions. Petitioner's App. D at 32a. The decision of the Court of Appeals is in accord with all other precedent regarding the extent of the Commission's authority to excuse past non-compliance when the Commission first asserts its jurisdiction.

I. The Commission Has Equitable Power to Excuse Past Non-compliance When It First Asserts Jurisdiction

Following the Supreme Court decision in *Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), the Commission began to regulate transactions which theoretically had always been within its authority. To deal with the problem of past failures to file the Commission formulated a policy announced in Order No. 282, 31 F.P.C. 972 (1964). In issuing Order No. 282, the Commission stated that "in the absence of valid objection by any interested party" it would not on its own look into past failures to file rate schedules by electric utilities who had assumed in good faith, albeit erroneously, that the Commission did not have jurisdiction over a company's wholesale

sales if that company had intrastate generation sufficient to meet the needs of its wholesale customers. *Id.* at 973.

The Court of Appeals upheld the power of the Commission to exercise discretion in this area. The Court found numerous analogous situations in which the Commission, faced with exercising jurisdiction over transactions previously ignored, forgave past failures in an effort to encourage compliance with the new regulatory scheme, as well as to avoid the administrative nightmare of attempting to deal with all past failures to file. In each case, following a landmark decision that the Commission had jurisdiction over certain types of transactions, the Commission established an effective date, later than the date of enactment of the Federal Power Act or the Natural Gas Act, from which to commence the exercise of its jurisdiction. Failures to comply with statutory provisions prior to that date were excused by the Commission. *E.g. California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) followed by ***Hugoton Production Co.***, 41 F.P.C. 490 (1969); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) followed by Order No. 174, 13 F.P.C. 1195, *modified in part by* Order No. 174A, 13 F.P.C. 1410 (1954); *Public Service Co. of New Hampshire*, 27 F.P.C. 830 (1962) followed by ***Niagara Mohawk Power Corp.*** v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967).

In *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) this Court upheld the Commission's jurisdiction over sales of natural gas which had been commingled with gas to be resold in interstate commerce. Many companies which had thought they were outside of the Commission's jurisdiction suddenly found that they were required to file their rates. The Commission excused all failures to file prior to its own decision in the *Lo-Vaca* case in 1961

because, as the Commission explained in *Hugoton Production Co.*, 41 F.P.C. 490, 497 (1969):

> "before the issuance of *Lo-Vaca*, we are of the opinion that the doctrine of that case may not have been predictable by many producers. Under the doctrine we determined that sales of gas to a pipeline where the gas sold is commingled with the inter-state stream is jurisdictional, although by contract the producer and pipeline agree that the gas is to be used in the same state or used for compressor fuel and not resold. The Producers might have felt, with some reason, that gas could have been isolated from the jurisdictional gas by contractual means. Therefore, we think as a matter of equity Hugoton should not be required to make a refund for this period."

The Commission took a similar course of action in Order No. 174 following this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), which made clear that independent producers of natural gas who sold in interstate commerce were subject to Commission regulation. The Commission in Order No. 174 stated:

> "Those producers and gatherers which come within the class found by the United States Supreme Court in the *Phillips* case to be subject to the Commission's jurisdiction should be afforded a reasonable opportunity to comply with the requirements of the Act to the end that the regulatory objectives of Congress may be achieved within the shortest feasible time. Also, in the interest of consumers, natural-gas companies and the public generally, practical considerations require us to deal with current problems which confront us as a consequence of the Court's decision and a reasonable cut-off date should be fixed in order

to avoid confusion in attempting to readjust past transactions." 13 F.P.C. at 1195.

The Commission thereafter established the date of the Supreme Court decision as the date it would commence enforcement of its jurisdictional powers.

Supported by this precedent, the Third Circuit, as well as the Commission and the Administrative Law Judge below, held that the Commission had authority to issue the directive in Order No. 282. As stated by the Third Circuit:

> "We conclude, however, that the Commission did act lawfully here. No statutory language prescribed the proper treatment for those who have in good faith failed to file. Excusing the past failures to file here is justified by several factors. Most significant is that the past failures to file were the result of a widespread misapprehension of the extent of the Commission's jurisdiction. Even the Court of Appeals in *Colton* shared this misapprehension. The failures to file were thus clearly in good faith. Since the companies were not culpable, they should not be punished for technical non-compliance." (footnote omitted) Petitioner's App. D at 32a-33a.

II. The Filed Rate Doctrine Does Not Preclude the Invocation of Equitable Discretion

Petitioner does not question the authority of the Commission to exercise discretion in deciding how to commence handling jurisdiction over utilities. Rather, Petitioner argues that once a utility has filed a rate, it cannot charge any other rate unless that rate is approved in the manner provided by the Federal Power Act. The basis for this "filed rate doctrine" is contained in § 205(c), (d) of the Federal Power Act, 16 U.S.C. § 824d(c), (d). Thus, according to Petitioner, while the Commission may excuse any utility for past non-compliance if that utility has never

filed a rate with the Commission, it cannot do the same for a utility which filed a rate twenty-five years before the Commission commenced exercising jurisdiction over the transactions in question.

The Court of Appeals disagreed with Petitioner and found that the fact that the Company had filed a rate long ago did not preclude the application of the Commission's equitable powers to the particular facts of the case before it. The Court found that the gist of the filed rate doctrine is that upon exercise of jurisdiction, no rate can thereafter be changed without compliance with statutory procedures. This is true whether a rate was initially filed or not.

> "[T]he filed rate doctrine provides no basis for distinguishing between companies who filed rates in the past and those who did not file at all. As already discussed, courts have held that where the Commission has jurisdiction over given sales and the parties have agreed to a certain rate, that rate may not be increased without prior filing even though the initial rate was never filed. Ellwood therefore has no greater claim to a refund than does any other purchaser whose supplier's past failure to file is excused pursuant to Order No. 282. Thus if the Commission has the discretion under these circumstances to excuse past failures to file and we have just held that it does, the filed rate doctrine imposes no special obstacle to the exercise of that discretion with respect to Penn Power here." (footnote omitted) Petitioner's App. D at 37a-38a.[4]

4. Alternatively, the Court of Appeals held that because the filed 1935 contract had expired by its own terms at a time when regulations did not require the filing of such termination, "there was no effective filed rate applicable to the sales in question and, as a result, the filed rate doctrine is not applicable." Petitioner's App. D at 37a.

The cases cited by Petitioner do not contradict this result.[5] Each case involved companies over which the Commission had already been exercising its jurisdiction. *E.g., Northwestern Public Service Co.* v. *Montana-Dakota Utilities Co.*, 181 F.2d 19 (8th Cir. 1950), *aff'd*, 341 U.S. 246 (1951); *Chicago, Milwaukee, St. Paul & Pacific Rr. Co.* v. *Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957). Obviously, once jurisdiction is recognized, the statutory procedures must be followed as long as jurisdiction exists. In each case in which a decision has been rendered finding greater jurisdiction than was generally believed to exist at the time of the enactment of the relevant statute, the Commission has applied its statutory procedures prospectively from the date its intention to exercise that greater jurisdiction was clear. *E.g., Hugoton Production Co.*, 41 F.P.C. 490 (1969); Order No. 174, 13 F.P.C. 1195 (1954). The filed rate doctrine is merely an example of one of those statutory procedures. In none of the cases cited by Petitioner has the filed rate doctrine been applied to limit the Commission's power to excuse past non-compliance with its governing statutes when the Commission first asserts its jurisdiction.

In the case of many electric utilities, including Penn Power, the jurisdictional question was not settled until the 1964 *Colton* decision. Since jurisdiction had existed since 1935, each electric utility theoretically should have filed rate schedules for each rate change since the passage of the

5. Petitioner's quotation from *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 343 (1956), is entirely out of context and is merely dictum. The issue in *United Gas* was whether a company could ignore the rate established in a contract merely by filing a new rate with the Commission, without negotiation with the other party to the contract. It was an attempt to misuse the statutory scheme by using the simple statutory notice requirement to excuse the company from contract provisions. The case had nothing to do with the extent of the Commission's power to excuse past non-compliance; rather the case dealt with whether the Natural Gas Act in any way substantively changed the rights of parties to a contract filed with the Commission.

Federal Power Act. *See, e.g., Cities Service Gas Producing Co.* v. *FPC*, 233 F.2d 726 (10th Cir.), *cert. denied*, 352 U.S. 911 (1956). To distinguish Penn Power from other electric utilities on the basis that it had once filed a rate is a distinction without a difference.

In reaching the conclusion that the filed rate doctrine was no bar to the Commission's exercise of its discretion, the Court of Appeals was greatly swayed by the fact that the protections offered by the filed rate doctrine would not be jeopardized by excusing the Company along with all other utilities which had not filed rates.

> "The doctrine has been applied under several regulatory schemes. It has meant somewhat different things to different circuits. The doctrine has been described as intending 'to prevent discriminatory rate payments', as 'reflecting a statutory bias in favor of retroactive rate reductions but not retroactive rate increases . . .' and as being primarily concerned with the 'preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.'
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> • • •
>
> "The purposes of the Act would not be furthered by such a result [applying the doctrine]. The underlying concern of the Act is to assure that the rates subject to its coverage are reasonable and that these rates are set and reviewed in a fair and orderly manner. Penn Power did not escape regulation by not filing with the Commission between 1940 and 1964. Its sales to Ellwood were subject to regulation by the Pennsylvania Public Utilities Commission and

all rate increases were filed with that agency." (footnotes omitted) Petitioner's Appendix D at 34a, 36a.[6]

In determining how best to commence asserting its jurisdiction in 1964, the Commission did nothing extraordinary requiring the attention of this Court. Rather, the Commission merely followed its general policy of refraining as a matter of equity from investigating past failures to comply with the statutory procedures when the failure was based on a good faith belief that the Commission did not have jurisdiction over the transactions in question. This action frustrates no purpose of the filed rate doctrine and conflicts with no prior decisions of any court.

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6. The Administrative Law Judge had gone further than the Court of Appeals by stating that the purpose of the filed rate doctrine was to prevent interference with the Commission's jurisdiction by others.

> "The filed-rate doctrine fends off interference with a regulatory agency's jurisdiction; it does not impede the exercise of that jurisdiction. Stated simplistically, the rule is that the agency may accept or alter a rate, but the rate as filed, *i.e.*, accepted or altered by the agency, is binding and not elsewhere subject to question or attack. Ellwood's argument that the doctrine holds the agency in a vise that prevents it from dealing, in accordance with its authority and duty under its governing statutes, with certain types of exigencies within its jurisdiction is a perversion of the doctrine. The categorical terms in which the restraints imposed by the doctrine are sometimes couched are misconstrued by Ellwood as being addressed to the Commission, although they are meant to manifest the impregnability of the wall protecting the regulatory jurisdiction from intrusion.
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> * * *
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> "Not surprisingly, Ellwood has cited no case supporting the view that the filed-rate doctrine is a limitation on agency authority." Petitioner's App. A at 5a-6a.

Moreover, the Administrative Law Judge concluded that it would be inequitable and discriminatory not to include Penn Power within the coverage of Order No. 282 "which was intended to apply to all like late filers." *Id.* at 12a.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of January, 1979, served three (3) copies of the foregoing document by first class mail and with postage prepaid upon the following:

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